

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DONTE McCLELLON,

11 Plaintiff,

v.

12 WELLS FARGO ADVISORS
13 FINANCIAL NETWORK, LLC
14 (CRD#:11025), *et al.*,

Defendants.

CASE NO. C18-0852-JCC

ORDER

16 This matter comes before the Court on Defendants' motion to dismiss (Dkt. No. 27)
17 Plaintiff's amended complaint (Dkt. No. 26). Having thoroughly considered the parties' briefing
18 and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS
19 Defendants' motion to dismiss (Dkt. No. 27) for the reasons explained herein.

20 **I. BACKGROUND**

21 The Court previously granted Defendants' motion to dismiss Plaintiff's complaint for
22 failure to state a claim. (Dkt. No. 25.)¹ The Court dismissed Plaintiff's complaint without

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25 ¹ This is one of six lawsuits filed by Plaintiff against various financial institutions, five of
26 which are pending before the Court. See *McClellon v. OptionsHouse*, Case No. C18-0817-JCC,
Dkt. No. 1-1 (W.D. Wash. June 5, 2018); *McClellon v. Bank of America, N.A.*, Case No. C18-
0829-JCC, Dkt. No. 1-1 (W.D. Wash. June 7, 2018); *McClellon v. Capital One Bank N.A.*, Case

1 prejudice and with leave to amend. (*Id.*) Plaintiff filed an amended complaint. (Dkt. No. 26.)

2 Plaintiff's amended complaint alleges that two unauthorized transactions occurred in his
3 Wells Fargo brokerage account in August 2016: a sale of 4,675 shares of SolarCity stock, and a
4 purchase of 10,000 shares of Square stock. (*Id.*) Plaintiff alleges that he informed Defendants
5 that these transactions were fraudulent in May 2017. (*Id.*)

6 Plaintiff asserts that his claims arise under the Uniform Commercial Code ("UCC"),
7 Washington Consumer Protection Act ("WCPA"), Washington State Securities Act ("Securities
8 Act"), and the regulations implementing the Electronic Fund Transfer Act, 15 U.S.C. § 1693, *et*
9 *seq.* ("Regulation E"). (*Id.*) Plaintiff also asserts that Defendants engaged in self-dealing, fraud,
10 and conversion, committed negligence, and breached their fiduciary duty. (*Id.*) Plaintiff seeks
11 treble damages under the WCPA, punitive damages, an award of his fees and costs, and an order
12 requiring Defendants to both make Plaintiff whole by returning his funds with prejudgment
13 interest and "return 519 shares of Tesla stock and 2500 shares of Monsanto stock to Plaintiff."
14 (*Id.*)

15 Defendants move to dismiss Plaintiff's amended complaint pursuant to Federal Rule of
16 Civil Procedure 12(b)(6). (Dkt. No. 27.)

17 II. DISCUSSION

18 A. Legal Standards

19 The Court may dismiss a complaint that "fails to state a claim upon which relief can be
20 granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain
21 sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.
22 *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A claim has facial plausibility when the plaintiff
23 pleads factual content that allows the court to draw the reasonable inference that the defendant is
24 liable for the misconduct alleged. *Id.* at 678.

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26 No. C18-0909-JCC, Dkt. No. 1-1 (W.D. Wash. June 21, 2018); *McClellon v. Citigroup Global*
Markets Inc., Case No. C18-0978-JCC, Dkt. No. 1-1 (W.D. Wash. July 2, 2018).

1 Although the Court must accept a complaint's well-pled facts as true, conclusory
2 allegations of law and unwarranted inferences will not defeat an otherwise proper Federal Rule
3 of Civil Procedure 12(b)(6) motion. *Vasquez v. L.A. Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007);
4 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A plaintiff is obligated to
5 provide grounds for his or her entitlement to relief that amount to more than labels and
6 conclusions or a formulaic recitation of the elements of a cause of action. *Bell Atl. Corp. v.*
7 *Twombly*, 550 U.S. 544, 545 (2007). “[T]he pleading standard Rule 8 announces does not require
8 ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-
9 harmed-me accusation.” *Iqbal*, 556 U.S. at 678.

10 **B. McClellon’s Claims**

11 1. Lack of Injury

12 In its order dismissing Plaintiff’s original complaint, the Court noted that Plaintiff’s
13 assertions that Defendants failed to notify him of the allegedly fraudulent transactions, protect
14 his account, or return his funds were insufficient to establish injury. (Dkt. No. 25 at 4.) The Court
15 also noted that Plaintiff had not demonstrated how his requested relief, a return of funds and an
16 award of Tesla and Monsanto stock, was connected to the allegedly fraudulent SolarCity and
17 Square stock transactions. (*Id.*)

18 In his amended complaint, Plaintiff states that he was harmed or injured as a result of
19 Defendants’ actions or inaction, that his damages must still be ascertained, and requests the same
20 relief. (See Dkt. No. 26 at 2–3, 6–7.) Plaintiff’s conclusory statements that he was harmed are not
21 sufficient to establish that he suffered injury. Plaintiff has not alleged facts that demonstrate the
22 sale of SolarCity stock and purchase of Square stock caused him a loss. Absent sufficient facts
23 pled on the issue of his injury, Plaintiff’s WCPA and negligence claims are both DISMISSED.
24 See *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986)
25 (the elements of a private WCPA claim include an injury suffered by the plaintiff); *Degel v.*
26 *Majestic Mobile Manor, Inc.*, 914 P.2d 728, 731 (Wash. 1996) (the elements of a negligence

1 claim include injury to the plaintiff).

2 2. UCC

3 Plaintiff alleges that Defendants violated “the Uniform Commercial Code (4.22.005 to
4 925)[.]” (Dkt. No. 26 at 1.) No such provision exists in the Washington Uniform Commercial
5 Code. The Court’s order dismissing Plaintiff’s original complaint noted that, if Plaintiff was
6 attempting to reference Article 4 of the UCC or its Washington equivalent, he pled “neither
7 specific facts nor law that would allow the Court to make such an inference or discern a plausible
8 UCC claim.” (Dkt. No. 25 at 5–6.) Plaintiff’s amended complaint has neither pled additional
9 facts relevant to a UCC claim nor provided legal argument supporting such a claim. Therefore,
10 any claim Plaintiff makes for violation of the UCC or its Washington equivalent is DISMISSED.

11 3. Securities Act and Fraud

12 To maintain a private action under the Securities Act, a plaintiff must establish “(1) a
13 fraudulent or deceitful act committed (2) in ‘connection with the offer, sale or purchase of any
14 security.’” *Kinney v. Cook*, 154 P.3d 206, 210 (Wash. 2007) (quoting Wash. Rev. Code §
15 21.20.010). The elements of common law fraud include representation of an existing fact and
16 falsity. *See Adams v. King Cnty.*, 192 P.3d 891, 902 (Wash. 2008). Plaintiff argues that
17 Defendants acted as a “broker” or “clearing house” through which the alleged fraudulent
18 transactions were conducted, and that Defendants were negligent in not verifying or reversing the
19 alleged fraudulent transactions. (Dkt. No. 26 at 2.) But Plaintiff does not allege that Defendants
20 themselves committed a fraudulent or deceitful act or made a false representation to him.
21 Therefore, Plaintiff has not alleged facts supporting a reasonable inference that Defendants
22 violated the Securities Act or committed common law fraud, and his claims are DISMISSED.

23 4. Breach of Fiduciary Duty

24 To establish a claim of breach of a fiduciary duty, a “plaintiff must prove (1) existence of
25 a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach
26 proximately caused the injury.” *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 40

1 P.3d 1206, 1217 (Wash. Ct. App. 2002). As discussed above, Plaintiff has not established that he
2 was injured by Defendants' alleged actions or inaction. Further, Plaintiff has not pled facts
3 leading to a reasonable inference that Defendants owed him a fiduciary duty. Plaintiff explicitly
4 states that "there's no signed contract" between the parties. (Dkt. No. 26 at 3.) Plaintiff instead
5 alleges that, "Defendant[s] made a promise of Fiduciary duty to Plaintiff." (*Id.*)² Plaintiff does
6 not provide any other facts about the alleged promise. Plaintiff's conclusory assertion that
7 Defendants made a promise to him is insufficient, standing alone, to establish that Defendants
8 owed him a fiduciary duty. As Plaintiff has failed to establish the existence of a duty owed or
9 injury, his claim that Defendants breached their fiduciary duty is DISMISSED.

10 Plaintiff also cites the Restatement (Third) of Agency and the Restatement (Second) of
11 Torts, as well as Washington case law applying agency principles to find agents liable for harm
12 suffered by principals. (*Id.* at 4–5.) But nowhere in his amended complaint does Plaintiff assert
13 that Defendants were his agents, and therefore are liable for his alleged harm. Further, even
14 construing Plaintiff's amended complaint liberally, Plaintiff has not pled sufficient facts leading
15 to a reasonable inference that Defendants were acting as Plaintiff's agents when the alleged
16 fraudulent transactions occurred. Therefore, to the extent that Plaintiff argues that Defendants are
17 liable to him for a breach of duty in their capacity as agents, such claim is DISMISSED.

18 5. Conversion

19 Plaintiff has failed to allege sufficient facts allowing the Court to draw a reasonable
20 inference that Defendants willfully interfered with Plaintiff's assets, wrongfully received funds
21 from Plaintiff's account, or possessed funds that they had an obligation to return to Plaintiff. *See*
22 *Consulting Overseas Mgmt., Ltd. v. Shtikel*, 18 P.3d 1144, 1147 (Wash. Ct. App. 2001)

23 2 In its order dismissing Plaintiff's original complaint, the Court noted that Plaintiff's
24 breach of contract and breach of fiduciary claims had to be based on his Client Agreement with
25 Defendants. (Dkt. No. 25 at 6.) The Court further stated that Plaintiff's claims were either barred
26 by his Client Agreement, or he could not bring them if he did not enter into the Client
Agreement. (*Id.*) In his amended complaint, Plaintiff has abandoned his breach of contract claim,
and premises his breach of fiduciary claim on the alleged promise from Defendants.

1 (describing elements of a conversion claim based on money). Therefore, Plaintiff's claim of
2 conversion is DISMISSED.

3 6. Regulation E

4 Regulation E consists of a series of regulations that lay out the "basic rights, liabilities,
5 and responsibilities of consumers who use electronic fund transfer and remittance transfer
6 services and of financial institutions or other persons that offer these services." 12 C.F.R.
7 § 1005.1. Plaintiff only asserts that, "There is also a case of Regulation E because there was an
8 unauthorized ACH and ACAT."³ Plaintiff's general reference to Regulation E does not inform
9 the Court of which provision Plaintiff is claiming Defendants violated. Further, Plaintiff's claim
10 that there was "an unauthorized ACH and ACAT" does not provide the Court with sufficient
11 factual information to evaluate how Defendants are liable for the alleged violation. Therefore,
12 Plaintiff's claim that Defendants violated Regulation E is DISMISSED.

13 7. Remaining Claims

14 Plaintiff's claims that Defendants engaged in "self-dealing" and "[manipulated]" his
15 funds represent "an unadorned, the-defendant-unlawfully-harmed-me accusation[s]," and
16 therefore are DISMISSED. *Iqbal*, 556 U.S. at 678.

17 **III. CONCLUSION**

18 Even construing Plaintiff's amended complaint liberally, the Court concludes that it fails
19 to state a claim upon which relief can be granted. *See Hebbe v. Pliler*, 627 F.3d 338, 342 (9th
20 Cir. 2010) (district courts are to construe *pro se* complaints liberally). Further, although the
21 Court previously dismissed Plaintiff's complaint without prejudice, further amendment would be
22 futile because Plaintiff has failed to correct the deficiencies in his complaint and has provided
23 nothing in his amended to complaint to suggest that he will do so in the future. *See Cervantes v.*
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25 ³ Plaintiff does not define either acronym. "ACH" appears as the abbreviation of
26 "automated clearinghouse" in Regulation E. *See* 12 C.F.R. § 1005.14. Regulation E does not
appear to use the acronym "ACAT."

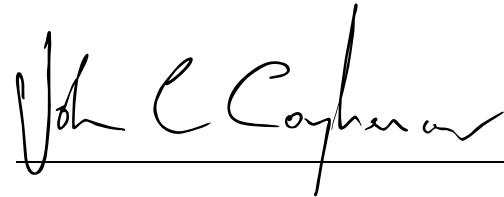
1 *Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

2 For the foregoing reasons, Defendants' motion to dismiss (Dkt. No. 27) is GRANTED.

3 Plaintiff's amended complaint (Dkt. No. 26) is DISMISSED with prejudice.

4 DATED this 11th day of October 2018.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE